BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of:	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	DA 04-3185, 3186, 3187

COMMENTS OF THE AMERICAN TELESERVICES ASSOCIATION
NONPROFIT AND CHARITIES COMMITTEE

I. INTRODUCTION

The American Teleservices Association Non Profit and Charities Committee (ATANPC) is a committee comprised of members of the American Teleservices Association who operate and work in the nonprofit sector and tele-fundraising industries. The ATA has been one of the preeminent trade associations representing call centers, trainers, consultants, and equipment suppliers that initiate, facilitate and generate telephone, internet, and email sales, fund raising, service and support. The ATANPC includes not only the aforementioned service providers, but also includes nonprofit organizations which have been recognized as exempt from federal income taxation under §501(c) of the United States Internal Revenue Code. The ATANPC represents members' interests by advocating on Capitol Hill and in statehouses nationwide, providing advanced professional education opportunities, defending the tele-fundraising and nonprofit industries in the public realm and providing a source of fundraising ethics to those who make telephone calls to solicit charitable contributions and public support.

The ATANPC is a "one-of-a-kind" committee which has been formed to not only advocate on behalf of its members, but to further provide ethical and legal guidance to its members. Members are required to subscribe to a written Code of Ethics that requires them to engage in fund raising activities in compliance with all applicable laws, as well as implementing practices designed to protect consumers and the integrity of the fund raising industry.

Most members of the ATANPC do not engage in the sale of goods or services on behalf of nonprofit organizations. Rather, their focus is on providing information, advocacy, and services connected to seeking financial or in-kind support on behalf of organizations granted tax-exempt status under §§ 501(c)(3), (4), (5), (6) and (19) of the Internal Revenue Code.

Geographically, the membership of the ATANPC is spread throughout the United States. Members engage in both interstate and intrastate fund raising activities, although primarily member focus is in the area of soliciting public support through interstate communications. The ATANPC Code of Ethics reflects the goal of all members to engage in activities that comply with any and all applicable federal, state and local laws. It is the desire of the members of the ATANPC to strive for a uniform set of regulations that apply to all telemarketing/fund raising efforts across interstate boundaries in a consistent manner. The present and potential future lack

of uniformity in these laws is contrary to the interests of ATANPC members and consumers. Those costs are ultimately passed on to nonprofit service providers and the American consumer. The ATANPC believes that the FCC has an unprecedented opportunity to coordinate federal telemarketing provisions to further consumer privacy, respect free speech and avoid duplicative and burdensome requirements on legitimate fund raising activities. The national regulatory scheme should eliminate duplication and inconsistencies between the FCC, FTC and state regulatory schemes.

While recognizing the value of meaningful regulation with the purpose of protecting consumers, the ATANPC believes that FCC action preempting state laws as applied to interstate telephone calls would confirm earlier FCC action on this subject, reduce consumer confusion regarding varying requirements, and eliminate needless expense. All three of these benefits would be achieved with no loss of consumer rights or protection as states, private citizens and federal regulators can enforce the federal rules. The ATANPC respectfully submits that federal preemption would result in a regulatory scheme with uniform application which consumers could easily understand and follow. The following comments are in support of that premise.

II. COMMENTS

The current circumstance offers the FCC a never before opportunity to reassert the position that there must be uniformity in the administration of standards and regulations governing interstate commerce teleservice activities. Uniform regulation would best serve the industry, the nonprofit community, as well as the American consumer.

The ATANPC believes that the frame of regulation set forth in the FTC's Telemarketing Sales Rule (TSR) and the FCC's Telephone Consumer Protection Act of 1991 (TCPA) establishes a comprehensive and near uniform approach to regulation of the telemarketing industry which should be extended on an even basis to cover all activity conducted in interstate commerce. Inconsistency and deviation from these regulations at the state level serve no meaningful purpose other than to create compliance issues that will inevitably raise the cost of goods and services provided.

III. JURISDICTION

The FCC should use its exclusive jurisdiction over interstate commerce telephone calls to enforce uniformity over states' do-not-call laws set forth in DA 04-3186, as well as the definitions pertaining thereto, as set forth in DA 04-3185.

A. DA 04-3186: The FCC should clarify its exclusive jurisdiction over interstate telephone calls by explicitly preempting state law with regard to state do-not-call lists.

The most duplicative burden facing ATANPC members and other legitimate nationwide businesses is compliance with the multitude of conflicting and inconsistent state "do-not-call" lists with application sometimes in direct conflict with federal law. IMC urges the FCC to take the national scope of its regulatory authority seriously and preempt state law

with regard to application to interstate telephone calls.

Congress was clear when it passed the TCPA. Federal law was needed because states did not have jurisdiction over interstate calls.

The preemption clause of the TCPA has often been cited but is seldom correctly limited to intrastate calls. Specifically, the TCPA reads:

Except for the standards prescribed under subsection (d) and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits—
(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
(B) the use of automatic telephone dialing systems
(C) the use of artificial or prerecorded voice messages; or
(D) the making of telephone solicitations.
(2) State use of databases. If, pursuant to subsection (c)(3), the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

47 U.S.C. §227(e).

This section is written to allow States to regulate intrastate calls.

However, it is clear from the legislative history of the TCPA that Congress intended the TCPA and the Communications Act of 1934 to preempt state laws as applied to interstate telephone calls.

The FCC has responded to consumer inquiries concerning preemption and stated unequivocally that it is the FCC's position that the TCPA preempts state regulation of interstate calls with regard to recorded messages. Specifically, a March 3, 1998 letter from Geraldine A. Matise, Chief, Network Services Division, to Mr. Sanford L. Schenberg states that: "In light of the provisions described above, states can regulate and restrict intrastate commercial telemarketing calls. The TCPA and Commission Regulations, enacted pursuant to the TCPA, govern interstate commercial telemarketing calls in the United States." Similarly, a January 26, 1998 letter from Ms. Matise to Delegate Ronald A. Guns of the Maryland House of Delegates specifically addressed the delivery of recordings by telephone and states that: "In light of the provisions described above, Maryland can regulate and restrict intrastate commercial telemarketing calls. The Communications Act, however precludes Maryland from regulating or restricting interstate commercial telemarketing calls. Therefore, Maryland cannot apply its statutes to calls that are received in Maryland and originate in another state or calls that originate

in Maryland and are received in another state." The definition of "interstate communication" is clearly defined in the Telecommunications Act of 1934 as "any communication from any state to any state." 47 U.S.C. § 153(22). The Guns and Schenberg letters are appended hereto for your convenience.

The Commission was also clear in its rulemaking amending the TCPA regulations in 2003. It provided an 18-month period for states to "harmonize" their lists with the federal do not call list. Report and Order, July 3, 2003, ¶77. More restrictive state laws applicable to interstate calls "almost certainly conflict with [the TCPA regulations]." Id. at ¶82. The FCC recognized the businesses should not be subject to multiple, conflicting legislative schemes. Id. at ¶83.

These facts led the Commission to the conclusion that "state regulation of interstate telemarketing calls that differ from our rules certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted." Id. at ¶84.

The legislative history to the TCPA shows that Congress intended the FCC to have exclusive jurisdiction over interstate calls. "Over forty states have enacted legislation limiting the use of ADRMPs or otherwise restricting unsolicited telemarketing. These measures have had limited affect, however because states do not have jurisdiction over interstate calls." Legislative History, S. Rep. No.102-178, p. 3. Further, Senate Report 102-177 repeats the claim under "the need for legislation" that:

As a result, over 40 States have enacted legislation limiting the use of automatic dialers or otherwise restricting unsolicited telemarketing. These measures have had limited effect however, because States do not have jurisdiction over interstate calls. Many States have expressed a desire for Federal legislation to regulate interstate telephone calls to supplement their restrictions on intrastate calls.

102 Senate Report 177 (page 3) (emphasis added).

Next, the comments of Senator Hollings concerning the law are set forth in the Congressional Record at 137 Cong. Rec. S. 18781 as:

Section 227(e)(1) clarifies that the bill is not intended to preempt State authority regarding intrastate communications except with respect to the technical standard under § 227(d) and subject of §227(e)(2). Pursuant to the general preemptive effect of the Communications Act of 1934, State regulation of interstate communications, including interstate communications initiated for telemarketing purposes, is preempted.

Id. at page 10 (emphasis added).

The FCC should clarify the language of the TCPA by ruling, in accordance with these two opinion letters and the legislative history, that the TCPA precludes states from regulating interstate telemarketing calls, including calls by or on behalf of charitable organizations.

B. State Do-Not-Call Laws.

The laws of the various states pertaining to do-not-call prohibitions contain a plethora of exemptions and exceptions, and in some instances restrictions which make these laws far more onerous than the national do-not-call registry. Official comments are being sought with respect to a few states which have implemented their own "do-not-call" proscriptions. New Jersey, Florida and North Dakota are prime examples of states with their own do-not-call lists, but are just three of many. Florida's law, implemented at Florida Statute Section 501.509, is similar to, but not identical to the federal no-call list. Florida law, for example, contains a content-based exemption from its restrictions for calls "by a newspaper publisher or his or her agent or employee in connection with his or her business." Fl. State. §501.059(1)(c)(4). This content-based exemption calls the constitutionality of the list itself into question.

Florida also charges its citizens a fee to add their name to the do-not-call list and charges telemarketers a fee of $400 to access the list. Over thirty states have their own do-not-call lists imposing fees telemarketers. A number of these states impose do-not-call lists, fees and charges on commercial firms hired by nonprofit organizations to solicit charitable contributions and related public support. In many instances, these state laws differ significantly from the federal scheme, or in the case of enforcing same against calls made by or on behalf of nonprofit organizations, are entirely in contradiction to the federal scheme.

The variables found in the states' do-not-call laws as applied to charitable solicitation activity are easily demonstrated through the simple review of the law of the state of North Dakota. North Dakota Code § 51-28-01, *et seq.* sets forth the requirements, the exemptions and limitations in the state's do-not-call law.

Although the solicitation by or on behalf of a nonprofit organization, regardless of whether it is conducted by an employee, volunteer, or a compensated agency has been found to be a form of fully protected speech [*See Riley v. National Federation of the Blind of North Carolina,* 487 U.S. 781 (1988)], the North Dakota do-not-call law makes a distinction regarding charitable speech and does not afford the same rights to nonprofit organizations that use professional tele-funding agencies.

In addition, the North Dakota statute also provides an exemption for any individual soliciting without the intent to complete, and who does not in fact complete, a sales presentation during the call, but who will complete the sales presentation at a later face-to-face meeting between the individual solicitor or person who made the initial call and the prospective purchaser. Thus, it can also be said that the statute provides a preference for commercial speech over fully protected charitable speech within the meaning of *Metro Media, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1980). Further evidence of the lack of uniformity and the power of lobbying is an exemption carved for newspapers, which provides under N.D. Cent. Code § 51-28-01(7) that an existing business

relationship includes a relationship between a seller and consumer based upon a free trial newspaper subscription within the past twenty-four months.

The lack of consistency between North Dakota and similar laws, and the standards set forth in the TCPA and TSR, makes interstate calling to solicit charitable contributions more expensive, requiring technical, legal and related expenditures to meet all compliance requirements. These costs are primarily borne by nonprofit, service organizations and consumers. The law in North Dakota, and in other states with laws similar to North Dakota, is also entirely inconsistent with the federal scheme.

The North Dakota do-not-call law is presently the subject of a constitutional challenge by two nonprofit organizations. The trial court has already ruled, declaring the law unconstitutional as applied to solicitations on behalf of nonprofit organizations (*See Fraternal Order of Police, North Dakota Lodge, et al v. Stenehjem,* F.Supp. 2d 1023 (D.N.D., Southeast Div., 2003). The State has appealed the decision to the United States Court of Appeals for the Eighth Circuit. The fact that nonprofit organizations were essentially forced to bring this claim as one means to attempt to make the application of the telemarketing restrictions consistent with the federal requirements evidences the importance of this issue.

C. Definition of Existing Business Relationships.

Another example of the many inconsistencies between the federal and state schemes is found in the New Jersey law. Under New Jersey law, the definition of "established business relationship" is at variance with that set forth in the FCC's and FTC's standards pursuant to 47 C.F.R. § 64.1200(f)(3) and 16 C.F.R § 310.2(n). This is just one example of a consistent variation existing between the plethora of state laws and the applicable FCC and FTC standards in the area of "established business relationship." The states have varying definitions of this important term. For example, in Alaska the period for the exemption of an "existing business relationship" is twenty-four months. Compare that to the exemption in Louisiana of only six months. *See* Alaska Code § 45.50.475(g)(3)(B)(v) and La. Rev. Stat. § 45:844.12(4)(c). However, under the North Dakota statute a nonprofit organization is not allowed to call a previous donor even if the donation was made within weeks, if the call is being initiated by a compensated commercial telefunding agency.

This is in contradiction to the FCC letter of January 26, 1998, (a copy is attached with this submission) which was referenced earlier in these comments. The desirability and indeed the necessity of uniformity was further echoed on July 25, 2003 when the Commission published its Rules and Regulations implementing the Telephone Consumer Protection Act of 1991; Final Rule found in the Federal Register, 68 Fed. Reg. At6 44155, § 62,wherein the Commission stated:

> We therefore believe that any state regulation of interstate telemarketing calls that differs from our rules almost certainly would conflict with and frustrate the federal scheme and almost

> certainly would be preempted. We will consider any alleged conflicts between state and federal requirements and the need for preemption on a case-by-case basis. Accordingly, any party that believes a state law is inconsistent with section 227 or our rules may seek declaratory ruling from the Commission. We reiterate the interest in uniformity – as recognized by Congress – and encourage states to avoid subjecting telemarketers to inconsistent rules.

IV. CONCLUSION

It is hard to envision any benefit that could result from uneven standards of regulation of the interstate communications industry. Additionally, the FCC has been clear in the past that calls by third party telemarketing firms or other businesses on behalf of tax-exempt nonprofits are not subject to rules governing telephone solicitations. Report and Order, July 3, 2003, para. 125-128. Such application raises serious constitutional questions regarding any state law which applies a do-not-call list or similar law to the activities of nonprofit fundraising over the telephone. The FCC should reaffirm this opinion, and protect it from erosion by differing state laws, by preempting these state laws with regard to their application to interstate telephone calls.

Members of the ATANPC follow the ATANPC Code of Ethics and have internal compliance programs which are designed to ensure compliance with all applicable state laws and federal requirements, and the rights of the consumer are of paramount concern and a matter of constant oversight. The ATANPC believes that uniformity is desirable and hopes to ensure the maximum protection of nonprofit organizations and consumers while holding the industry to responsible standards of conduct.

Respectfully submitted,

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Attachment